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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 JULIO ARRIAGA,

12 Plaintiff,

13 vs.

14 UNITED STATES OF AMERICA,

15 Defendant.

CASE NO. 07-CV-1614 H (WMC)

**ORDER GRANTING MOTION  
TO DISMISS**

16 On October 24, 2008, the government filed a motion to dismiss Plaintiff's complaint.  
17 (Doc. No. 17.) Plaintiff filed his opposition to the motion on November 18, 2008. (Doc. No.  
18 20.) On November 21, 2008, the government filed its reply in support of the motion to  
19 dismiss. (Doc. No. 21.) Subsequently, the Court ordered additional briefing on the issue of  
20 equitable tolling in light of an identical state action filed by the Plaintiff. (Doc. No. 24.) On  
21 December 10, 2008, the government filed its briefing on this issue. (Doc. No. 25.) Plaintiff  
22 filed his response on December 17, 2008 (Doc. No. 26.) After due consideration, the Court  
23 grants the government's motion and dismisses Plaintiff's complaint without prejudice.

24 **Factual and Procedural Background**

25 In August 2005, Plaintiff alleges that he was operating his vehicle in Calexico,  
26 California when U.S. Border Patrol agent Scott M. Templin negligently caused his service  
27 vehicle to collide with Plaintiff's. (Compl. ¶ 8.) Plaintiff alleges injuries and damages related  
28 to this incident.

1 On or about January 26, 2006, Plaintiff, through counsel, filed an administrative claim  
 2 for his injuries. (Johnson Decl. ISO Mot. to Dismiss [“Johnson Decl.”] Ex. 1.) On or about  
 3 August 22, 2006, U.S. Customs and Border Protection denied Plaintiff’s administrative claim  
 4 and sent Plaintiff’s counsel a letter to that effect. (Johnson Decl. Ex. 2.) The letter stated that,  
 5 if Plaintiff was dissatisfied with the denial, he could “file suit in an appropriate United States  
 6 District Court not later than six months after the date of mailing of this notification.” (*Id.*)

7 Six months later, on February 22, 2007, Plaintiff filed a complaint against the U.S.  
 8 Border Patrol and Scott M. Templin in the Superior Court of California for the County of  
 9 Imperial. (Azizi Decl. in Opp. to Mot. to Dismiss [“Azizi Decl.”] Ex. 2.)

10 After the state action was dismissed, Plaintiff began this litigation by filing a district  
 11 court complaint on August 14, 2007. (Doc. No. 1.) On October 24, 2008, the government  
 12 filed a notice of substitution pursuant to 28 U.S.C. § 2679(d)(1) along with the Attorney  
 13 General’s certification that Scott Templin was acting in the scope of his federal employment  
 14 at the time of the collision. (Doc. No. 18.) The government simultaneously filed a motion to  
 15 dismiss on the grounds that the statute of limitations barred Plaintiff’s claim. (Doc. No. 17.)  
 16 Plaintiff argued against a strict interpretation of the statute of limitations and on November 26,  
 17 2008, submitted a declaration indicating that the state action had been reopened. (Doc.  
 18 No. 23.)

### 19 Discussion

20 The doctrine of sovereign immunity shields the federal government and its agencies  
 21 from suit, absent a waiver of that immunity. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). The  
 22 Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 1346 et al., waives the government’s  
 23 sovereign immunity under circumstances where the United States, if a private person, would  
 24 be liable. *United States v. Olson*, 546 U.S. 43, 45-46 (2005). Plaintiff’s complaint against the  
 25 government for negligence necessarily depends on the FTCA’s waiver of sovereign immunity.

26 The FTCA provides that a “tort claim against the United States shall be forever  
 27 barred . . . unless action is begun within six months after the date of mailing . . . of notice of  
 28 final denial of the claim by the agency to which it was presented.” 28 U.S.C. § 2401(b). *See*

1 also, Graham v. United States, 96 F.3d 446, 447 (9th Cir. 1996) (“Any district court action  
2 must be filed within certain time constraints keyed to the date the agency disposes of the  
3 claim.”).

4 Recently, the Ninth Circuit has stated unequivocally that equitable tolling does not  
5 apply to the FTCA’s statute of limitations. Marley v. United States, \_\_\_ F.3d \_\_\_, 2008 WL  
6 5120753 at \*6 (9th Cir. Dec. 8, 2008). In Marley, the court relied on the Supreme Court’s  
7 instruction that “when Congress attaches conditions to legislation waiving sovereign immunity  
8 of the United States, those conditions must be strictly observed.” Id. at \*3 (quoting Block v.  
9 North Dakota ex re. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 287 (1983)). The court  
10 concluded that the statute of limitations in § 2401(b) is a jurisdictional requirement. Id. at \*6.  
11 This holding was consistent with prior precedent. See, e.g., Goodman v. United States, 298  
12 F.3d 1048, 1053 (9th Cir. 2002) (“A district court does not have jurisdiction to hear a tort claim  
13 against the United States unless the claimant files a complaint in federal court within six  
14 months after a final agency decision.”). Because timeliness under § 2401(b) determines  
15 subject matter jurisdiction, the Court may consider affidavits and other evidence properly  
16 before it. Sommatino v. United States, 255 F.3d 704, 709 n.3 (9th Cir. 2001).

17 In this case, the agency rendered a final decision on Plaintiff’s claim on or about August  
18 22, 2006. (Johnson Decl. Ex. 2.) Plaintiff did not file a claim in federal court until August 14,  
19 2007, nearly one year later. Because Plaintiff did not file in federal court within six months  
20 after the agency decision, the Court concludes that it is without jurisdiction to hear the claim.  
21 The statute of limitations cannot be equitably tolled to preserve this action.

22 Nonetheless, even if equitable tolling were applicable, it would not be available to the  
23 Plaintiff on these facts. Plaintiff points out that the government did not certify that Templin  
24 was acting within the scope of his employment until October 2008. However, the Ninth  
25 Circuit has held that, under § 2401(b), the statute of limitations period begins when the  
26 Plaintiff knows the fact of the injury and its immediate cause. Henley v. United States, 531  
27 F.3d 1052, 1057 (9th Cir. 2008). The Henley court reversed a district court’s holding that a  
28 claim against the government did not accrue until the Plaintiff knew or should have known that

1 the negligent individual was acting in the scope of federal employment. Id. It is well  
2 established in this circuit that “ignorance of the involvement of United State employees is  
3 irrelevant” to the timeliness of a claim under the FTCA. Dyniewicz v. United States, 742 F.2d  
4 484, 487 (9th Cir. 1984).

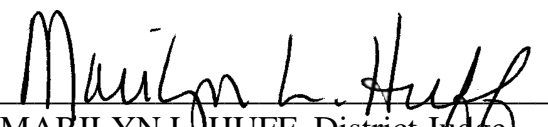
5 Plaintiff relies on Staple v. United States, 740 F.2d 766 (9th Cir. 1984) to support his  
6 argument that the timeliness of this suit should be assessed from the date he filed his state court  
7 action. Staple involved an FTCA case that was filed in state court before the § 2401(b)  
8 deadline but removed to federal court after the deadline. The Ninth Circuit reversed the district  
9 court’s dismissal for lack of subject matter jurisdiction, holding that, under those  
10 circumstances, the timeliness of the claim turns on the date of filing, not the date of removal.  
11 Id. at 769-70. Therefore, assuming Staple does not conflict with recent precedent, if Plaintiff’s  
12 state court action were removed to federal court, its timeliness would be determined based on  
13 the filing date of the state litigation. However, this case was not removed from state court.  
14 On its face, the Staple opinion applies to only removed actions. Id. at 769. In light of the  
15 Supreme Court’s admonition that conditions like § 2401(b) must be strictly observed, and the  
16 Ninth Circuit’s holdings that § 2401(b) is a jurisdictional requirement, this Court declines to  
17 extend the Staple holding to these facts. Plaintiff’s action is untimely under 28 U.S.C.  
18 § 2401(b) and must be dismissed for lack of subject matter jurisdiction.

### 19 Conclusion

20 Because the Court lacks subject matter jurisdiction over this action, the Court grants  
21 Defendant’s motion and dismisses Plaintiff’s complaint without prejudice.

22 IT IS SO ORDERED.

23 DATED: December 29, 2008

24   
25 MARILYN L. HUFF, District Judge  
26 UNITED STATES DISTRICT COURT  
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